

23-CV-00853

MOTION HEARING

03/19/2024

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION

UNITED STATES OF AMERICA, )  
Plaintiff, )  
vs. ) Case No. 1:23-CV-00853  
GREG ABBOTT, in his capacity ) Austin, Texas  
as Governor of the State of )  
Texas, and THE STATE OF TEXAS ) March 19, 2024  
Defendants. )  
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TRANSCRIPT OF MOTION HEARING  
BEFORE THE HONORABLE DAVID A. EZRA  
SENIOR UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF UNITED STATES OF AMERICA:

BRIAN LYNK, ESQUIRE  
ANDREW KNUDSEN, ESQUIRE  
MARY KRUGER, ESQUIRE  
Department of Justice  
Environment and Natural Resources Division  
P.O. Box 7611  
Washington, DC 20044  
(202) 514-2285  
andrew.knudsen@usdoj.gov

FOR THE DEFENDANTS STATE OF TEXAS and GREG ABBOTT:

MUNERA AL-FUHAID, ESQUIRE  
MONROE DAVID BRYANT, ESQUIRE  
JOHNATHAN STONE, ESQUIRE  
RYAN D. WALTERS, ESQUIRE  
JACOB E. PRZADA, ESQUIRE  
KYLE TEBO, ESQUIRE  
Texas Office of the Attorney General  
Special Litigation Division  
209 W. 14th Street, 7th Floor  
Austin, Texas 78701  
(512) 936-2172  
ryan.walters@oag.texas.gov

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1 APPEARANCES (CONT):

2 ALSO PRESENT:

3 James Sullivan, Esquire  
4 Trevor Ezell, Esquire

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15 COURT REPORTER:

16 Lisa A. Blanks, CSR, CRR, RPR  
17 Official Court Reporter, U.S.D.C.  
262 West Nueva Street  
18 San Antonio, Texas 78207  
Phone (210) 244-5038  
lisa\_blanks@txwd.uscourts.gov

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U.S.D.C. Official Court Reporter  
Lisa A. Blanks

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1       *(Tuesday, March 19, 2024, in open court.)*

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3               THE CLERK: Austin 23-CV-00853, United States of  
4 America versus Abbott, et al.

5               THE COURT: All right. Good morning, Counsel, to all  
6 of you. Can I have appearances, please.

7               MS. AL-FUHAID: Good morning, Your Honor. Munera  
8 Al-Fuhaid, David Bryant, Johnathan Stone, Kyle Tebo, Ryan  
9 Walters and Jacob Przada on behalf of Governor Abbott and the  
10 State of Texas.

11              THE COURT: All right. And how about the two  
12 gentleman back there? Let's not forget them.

13              MS. AL-FUHAID: They're with the Governor's office,  
14 Your Honor, Mr. Sullivan and Mr. Ezell.

15              THE COURT: I know Mr. Sullivan. Mr. Sullivan and I  
16 have become very good friends over the years. Mr. Sullivan's a  
17 good man, very very efficient.

18              Okay.

19              MR. KNUDSEN: Good morning, Your Honor. This is  
20 Andrew Knudsen on behalf of the United States. With me are  
21 Brian Lynk and Mary Kruger.

22              THE COURT: Yes, good morning.

23              All right. Counsel, this is your motion to dismiss,  
24 and for those who are here, we have a lot of cases that  
25 surround the border. This is what we euphemistically call the

1 buoy case, all right, so there's no misunderstanding.

2           There's an SB4 case and another SB4 case that I'm not  
3 handling, but this is the buoy case.

4           All right, Counsel, you can do it either from there  
5 or you can do it from the podium, whichever you prefer.

6           MS. AL-FUHAID: I'll do it from here, Your Honor.

7           Can you hear me?

8           THE COURT: I sure can.

9           MS. AL-FUHAID: Thank you, Judge Ezra. May it please  
10 the Court, this Court should dismiss the United States of  
11 America's First Amended Complaint for two reasons: First, it  
12 should dismiss Count 2 of the amended complaint because  
13 Article 7 of the Treaty of Guadalupe Hidalgo of 1848 is not  
14 enforceable in a United States District Court.

15           Second, it should dismiss Count 1 of the amended  
16 complaint because state governments and state officers are not  
17 persons to whom Section 10 of the Rivers and Harbors  
18 Appropriation Act of 1899 applies.

19           The 1848 Treaty of Guadalupe Hidalgo is not  
20 self-executing and therefore it imposes no obligations on  
21 Texas.

22           The United States' argument regarding the Treaty's  
23 application to Texas in this matter is entirely grounded in the  
24 notion that Article 7 of the Treaty is by itself binding on  
25 Texas.

1           The United States Supreme Court has clarified for  
2 more than 200 years of jurisprudence that the Constitution  
3 allows the United States Senate to ratify a treaty and leave it  
4 non-self-executing, which means that it cannot be enforced in  
5 United States courts.

6           When the U.S. Senate ratified the Treaty of Guadalupe  
7 Hidalgo, it made it clear that the Treaty was not  
8 self-executing.

9           The Supreme Court in the Medellin case instructs that  
10 this case should first look to the text of the Treaty itself  
11 when determining whether a treaty is self-executing.

12           The text of Article 21 of the Treaty provides that  
13 the exclusive remedy is that a party to the Treaty may have  
14 recourse to mutual representations and specific negotiations  
15 between the two countries.

16           It also specifies that the two Republics should  
17 endeavor to settle their differences by the arbitration of  
18 commissioners appointed on each side or by that of a friendly  
19 nation.

20           THE COURT: Counsel, could I interrupt you for just a  
21 moment to ask you a question?

22           MS. AL-FUHAID: Of course.

23           THE COURT: Good.

24           There is a difference -- in this case, the United  
25 States has used the Treaty as a cause of action, right?

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1 MS. MUNERA: It has asserted a cause of action, yes.

2 THE COURT: Yes, based on the Treaty?

3 MS. AL-FUHAID: Yes.

4 THE COURT: So what you are challenging is whether  
5 the Treaty can be a cause of action. I want to distinguish  
6 that from an argument that has been made and which I addressed  
7 in another case, and that had to do -- and also in this case  
8 earlier -- had to do with the impact of certain actions taken  
9 by the Texas legislature on international relations with  
10 Mexico.

11 That's a very different thing. Would you agree with me?

12 I'm not saying that you should agree with me that it has  
13 an impact, but that it's a different animal from having the  
14 cause of action.

15 MS. AL-FUHAID: Yes, Your Honor.

16 THE COURT: Okay. Go ahead, please.

17 MS. AL-FUHAID: Nowhere in the text of the Treaty  
18 does it contemplate resort to judicial remedies or contain any  
19 directive to American courts or to Mexican courts.

20 Instead, the Treaty is an international commitment between  
21 the United States and Mexico, and if any grievances under the  
22 Treaty arise, they are to be remedied through diplomatic and  
23 political courses of action.

24 It is for the United States and Mexico to determine how  
25 they will comply with their international commitment to each

1 other. But there is no obligation on Texas or on any other  
2 state to comply with the Treaty because it is not  
3 self-executing.

4 The core meaning of the Senate's decision to make the  
5 Treaty non-self-executing is that if something in the Treaty is  
6 going to change domestic law in the United States, then the  
7 enactment of additional executing legislation is necessary.

8 Such a treaty does not become binding domestic law upon  
9 ratification, but when Congress acts to change United States  
10 law.

11 And the non-self-executing character of the Treaty of  
12 Guadalupe Hidalgo is confirmed not only by the text of the  
13 Treaty, but also by the actions that Congress and the President  
14 took to enact numerous federal statutes implementing other  
15 articles of the Treaty.

16 For over 175 years, the President and Congress have  
17 consistently taken the position that the Treaty is not  
18 self-executing. Most of Congress' post ratification statutes  
19 addressed Article 8's guarantee of preexisting title to land in  
20 the territories that Mexico ceded to the United States pursuant  
21 to the Treaty.

22 In 1851 Congress enacted, and the President signed into  
23 law, a statute to execute the Treaty by creating a commission  
24 to verify California land titles derived from the Spanish  
25 government or derived from the Mexican government.

1 And the purpose of the statute was to implement  
2 Article 8's provision protecting pretreaty land titles in  
3 California.

4 The non-self-executing nature of the Treaty is also  
5 demonstrated by a sequence of statutes executing the Treaty's  
6 land title provisions in 1854.

7 Congress passed and the President signed into law the New  
8 Mexico Surveyor General legislation. In that legislation,  
9 Congress directed the surveyor general to investigate Spanish  
10 land grant claims and Mexican land grant claims in the  
11 territory, and to recommend, through the Secretary of the  
12 Interior, congressional approval or rejection of the claims.

13 Congress established similar surveyors general by statute  
14 for Colorado and for Arizona in 1861.

15 In 1891, Congress enacted and the President signed into  
16 law a statute forming a court of private land claims to execute  
17 the Treaty by addressing the land grant claims in New Mexico,  
18 Arizona, Utah, Nevada, Colorado, and in Wyoming.

19 And in 1889, the United States and Mexico, by treaty,  
20 formed the International Boundary Commission, which is the  
21 predecessor entity to the modern day International Boundary and  
22 Water Commission, and they agreed that the agency would have  
23 exclusive jurisdiction over disputes that arose under the 1848  
24 Treaty.

25 In the Botiller case, *Botiller v Dominguez*, the Supreme



1 Court rejected an argument that the 1851 statute was invalid as  
2 violating the terms of the Treaty. In that case, the  
3 challenger had alleged that the statute was invalid because it  
4 failed to fulfill the Treaty's provision that Mexican land  
5 titles in the ceded territories would be inviolably respected,  
6 and the challenger cited the Treaty's guarantee of existing  
7 title.

8 The Court reasoned that if the Treaty was violated by that  
9 statute, it was a matter of international concern because the  
10 statute was enacted for the purpose of ascertaining the  
11 validity of claims derived from the Mexican government, and the  
12 two states would have to determine by treaty matters of  
13 international concern related to any violation of that Treaty.

14 The Court ruled that it could not enforce the Treaty's  
15 provisions by itself. And the Court stated, "This Court, in a  
16 class of cases like the present, has no power to set itself up  
17 as the instrumentality for enforcing the provisions of a treaty  
18 with a foreign nation which the government of the United States  
19 as a sovereign power chooses to disregard."

20 Had the President or Congress considered the Treaty to be  
21 self-executing, there would have been no need for any such  
22 legislation. The titles of landowners in territories ceded to  
23 the United States under the Treaty simply would have been  
24 entitled to be inviolably respected in state and federal courts  
25 as part of the supreme law of the land.

1 But Congress and the President instead believed  
2 legislation was needed to execute the Treaty, and enacted  
3 implementing legislation to do so in 1851, 1854, 1861, and  
4 1891.

5 Now, under the Rivers and Harbors Act, a state government  
6 and a state officer are not persons against whom federal  
7 government may obtain injunctive relief, because the definition  
8 of person in the Rivers and Harbors Act does not encompass  
9 state governments or state officers.

10 First, state governments rely on the presumption that  
11 person excludes the government, and the dictionary acts  
12 presumptive definition of person which does not include state  
13 governments.

14 In determining the meaning of any federal statute, the  
15 word person only includes corporations, companies,  
16 associations, firms, partnerships, joint stock companies, and  
17 individuals, unless the context indicates otherwise.

18 THE COURT: But hasn't -- Counsel, may I ask you a  
19 question? Hasn't the Supreme Court dealt with several cases in  
20 which states were involved under the Rivers and Harbors Act?

21 MS. AL-FUHAID: Well, when you say states were  
22 involved, there is a case that it dealt with when a state sued  
23 the federal government seeking to get the federal government to  
24 stop building a dam. That applied -- that case applied the  
25 Rivers and Harbors Act to a federal government, not to a state

1 government. That's the U.S. v Arizona case.

2 THE COURT: Right. I think there may be another one,  
3 but anyway, we'll hear from counsel for the government.

4 I'm having a very difficult time thinking that Congress  
5 would have passed a law like the Rivers and Harbors Act and  
6 left it up to the states to just decide for themselves on -- I  
7 understand that there's an issue, and I'm sure you'll get to  
8 it, about the navigability of the Rio Grande River, which I  
9 think is either the third -- maybe the third largest river in  
10 the United States.

11 Putting that aside, let's assume that it's navigable,  
12 okay. In some parts I think the State would concede it's  
13 navigable. How about the -- let's talk about the Mississippi  
14 River for a minute. I think we all would agree the Mississippi  
15 River is a navigable waterway in the United States.

16 Although, by the way, it has gotten so low at times that  
17 they've actually had to restrict navigation on it, the Coast  
18 Guard, but let's assume that it's a navigable waterway.

19 Can you imagine each state deciding for themselves that  
20 they are going to put an obstruction in the Mississippi River?  
21 I mean, they have the resources, a lot more than a private  
22 entity, and they're just going to put a big old something out  
23 there, who knows what, and it's going to maybe not go all the  
24 way across the river but certainly build a harbor there.

25 They want to enhance themselves so they put a harbor

1 with -- like they did in Normandy during World War II, you  
2 know, they built these little harbors that were temporary until  
3 the storm hit and they all blew away.

4 Assuming for just a moment that we're talking about a more  
5 permanent harbor, they just decided they want to put a harbor  
6 out there.

7 Illinois, for instance, and somebody else is -- *Wait a*  
8 *minute, that's going to really obstruct navigation here, and*  
9 *then down the river somebody says, Well, they're doing it,*  
10 *we're going to do it, too, because we want that business.*

11 MS. AL-FUHAID: If I may, Your Honor --

12 THE COURT: I can't imagine that the Congress would  
13 say, *Well, that's a good idea.*

14 MS. AL-FUHAID: Well, the Court doesn't have to  
15 reach -- in this matter, the Court doesn't have to reach the  
16 issue of navigability to rule on this Rivers and Harbors Act,  
17 this motion under the Rivers and Harbors Act, because if the  
18 Court determines that -- if the Court agrees with the State --

19 THE COURT: Well, yeah, I would have to hold that the  
20 federal government doesn't have a standing, right? Isn't that  
21 what you're arguing?

22 MS. AL-FUHAID: Well, not that the Government doesn't  
23 have standing, but that the --

24 THE COURT: It doesn't apply to the State, the State  
25 can do whatever it wants.

1 MS. AL-FUHAID: Well, that the Rivers and Harbors Act  
2 does not apply to a state or a state officer.

3 THE COURT: What you're saying, essentially, is that  
4 the State -- in this case, Governor Abbott, has -- I guess it  
5 was -- it wasn't a state -- it wasn't a law. Governor Abbott  
6 directed the buoy out there, right, in his executive authority,  
7 correct?

8 MS. AL-FUHAID: Yes, Your Honor.

9 THE COURT: Okay. So Governor Abbott decided he  
10 wants to put this buoy out there, and there's all kinds of  
11 conflicting opinions as to whether -- I've already ruled in one  
12 portion of this case that it was a hazard to navigation. Not  
13 as much about the buoy itself, because that's pretty visible,  
14 but there's these massive concrete pilings that kind of stick  
15 up on either side of it that are hooked by chains, and they're  
16 very dangerous.

17 Having grown up around the water my whole life and been on  
18 the water, I know what can happen when a boat, particularly a  
19 small boat, hits a concrete abutment or a pylon that's hidden.  
20 It rips the whole bottom out of it and it can be a deadly  
21 event.

22 And we have, admittedly, Border Patrol and DPS -- I think  
23 it's DPS -- agents flying around in those airboats, they're  
24 called airboats, whatever they are, but they still draft water.  
25 They're not flying over the top. And they hit one of these

1 concrete abutments and it's a bad situation.

2       What if the Governor decided, well, you know, those buoys  
3 just aren't doing the job. People can get around them or  
4 whatever, right. We're going to build a -- essentially a wall  
5 in the water, a big tall wall in the water. We're going to  
6 build it for dozens and dozens of miles all along the  
7 Rio Grande where it abuts Texas. We're going to build a giant  
8 wall in the water. It can be done. Just talk to the people of  
9 Holland, okay.

10       And now people are not -- they're going to not only cross  
11 the river, they're going to have to get over the river, but  
12 this thing is way out there on the U.S. side, not the Mexican  
13 side, okay. We're going to build a big wall.

14       Under your view, he could do that, right?

15       MS. AL-FUHAID: Potentially, Your Honor, but our  
16 argument is not that Congress doesn't have commerce power to  
17 stop any particular obstruction. Our argument is that Congress  
18 did not do that in the Rivers and Harbors Act by applying it to  
19 States.

20       THE COURT: Oh, I understand. I mean, Congress could  
21 certainly go back, and well, who knows, I mean, it can't pass  
22 anything -- but assuming that you could get agreement among  
23 members of Congress that this is a bad idea. I don't think  
24 you're going to get it now, but you're telling me that the  
25 Rivers and Harbors Act -- and I agree with you.

1 I think that under your interpretation of the Rivers  
2 and Harbors Act -- I'm not saying I agree with your  
3 interpretation, but your interpretation of the Rivers and  
4 Harbors Act, he could build a wall that goes from the bottom of  
5 the river and extends up, say, 10, 15 feet, and you can do  
6 that. There's concrete that you can do. I mean, it's -- all  
7 the time they build piers out of concrete, even in salt water,  
8 and this is not salt water.

9 So it just flummoxes me to think that Congress would think  
10 that was okay under the Rivers and Harbors Act. I just can't  
11 imagine it.

12 MS. AL-FUHAID: Well, there is a presumption --

13 THE COURT: I mean, we're putting all the -- I mean,  
14 I don't think you can -- we haven't seen it challenged yet  
15 under environmental rules, but I can bet you that's coming  
16 soon. That would be a whole other ball of wax, because before  
17 you did something like that, you probably would have to do an  
18 environmental impact statement.

19 MS. AL-FUHAID: Well, Your Honor, this presumption --

20 THE COURT: I don't know that we have an  
21 environmental impact statement for the buoys, but I don't think  
22 so.

23 MS. AL-FUHAID: I'm not aware of one, Your Honor.

24 THE COURT: No. I'm not trying to give anybody any  
25 ideas. I'm just saying -- go ahead, Counsel.

1 MS. AL-FUHAID: Your Honor, this presumption that the  
2 definition of person excludes states has created a reliable  
3 legal structure against which Congress legislates, and that  
4 structure is essential to preserving the appropriate balance of  
5 power between the states and the federal government.

6 So Congress relies upon the presumptive definition and the  
7 dictionary act definition of person so that it knows how the  
8 word person will be interpreted and applied when it uses the  
9 word in statutory language.

10 Here in the Rivers and Harbors Act there is no indication  
11 that Congress intended to expand the definition of person to  
12 include state governments or state officers. To extend the  
13 definition of person to encompass state governments, Congress  
14 must make a clear statement that it intended to do so.

15 A helpful case for the Court to consider is the Wilson  
16 case. The Wilson case was decided in 1979 and discussed the  
17 presumption that the term person does not ordinarily include  
18 sovereign states and emphasized that this presumption is  
19 especially strong when the statute imposes a burden or a  
20 limitation rather than a benefit.

21 The Wilson Court noted that Congress must make its  
22 intention to legally burden or impact the powers of sovereign  
23 states vis-a-vis the federal government unmistakably clear in  
24 the language of the statute.

25 The Wilson Court relied on the Cooper case in holding that



1 the term person excludes a sovereign state. That case was  
2 about whether the government could bring an action for civil  
3 damages under the federal antitrust statutes seeking treble  
4 damages. The statute contained a comparable definition of  
5 person to the definition in the Dictionary Act.

6 The Supreme Court relied on the presumptive definition of  
7 person to exclude the sovereign and reasoned that it looked to  
8 what Congress said to the text of the statute and found that  
9 there was no affirmative indication in the text that Congress  
10 intended to include the government. That Court ruling was from  
11 1941.

12 In 1955, Congress passed a law that allowed the government  
13 to initiate civil actions for damages in antitrust matters.

14 In 1990, Congress passed another law allowing the  
15 government to seek treble damages. Not by changing the  
16 definition of the term "person," but by enacting other  
17 provisions of law that permitted the government to bring civil  
18 actions and later on to seek treble damages.

19 In another example, in the Will case, the plaintiff sued a  
20 state and a state official, seeking relief under a federal  
21 civil rights statute, which provided that a person who violated  
22 constitutional rights acting under a color of state law was  
23 liable to the injured party. The Court relied on cases like  
24 Wilson to hold that the term "person" in the statute excluded  
25 sovereign states and state officers.

1 Yet another example is the Return Mail case in which the  
2 Supreme Court ruled that federal government was not a person  
3 with the ability to bring an action to review a patent after it  
4 was issued. The Court applied the presumption that the  
5 definition of person in a statute excludes the sovereign.

6 In the Vermont Agency of National Resources case, the  
7 Court emphasized that the term persons should not be understood  
8 to include states when doing so would alter the balance of  
9 power between the state government and the federal government.

10 Section 10 of the Rivers and Harbors Act generally makes  
11 it unlawful to obstruct navigable capacity or to construct  
12 certain structures in navigable rivers of the United States  
13 without a permit to do so from the United States Army Corps of  
14 Engineers.

15 Section 12 of the Rivers and Harbors Act defines the  
16 parties to whom Section 10 applies and authorizes legal action  
17 and legal remedies against them.

18 Now, the first sentence of Section 12 says, "Every person  
19 in every corporation that shall violate any of the provisions  
20 of that title, of those certain sections of the title, shall be  
21 deemed guilty of a misdemeanor and can be punished by a fine or  
22 by imprisonment or by both."

23 The second sentence says, "And further, the removal of any  
24 structures or parts of structures erected in violation of the  
25 provisions of the previously referenced sections may be

1 enforced by the injunction of any district court exercising  
2 jurisdiction in any district in which said structures may  
3 exist." And it mentions that, "Proper proceedings to that end  
4 may be instituted under the direction of the Attorney General."

5 So the second sentence related to the injunction refers to  
6 the persons and the corporations in the first sentence. So an  
7 injunction can be obtained against the same persons and  
8 corporations that can be convicted of a crime.

9 Here, there is nothing in the text or the context of the  
10 Rivers and Harbors Act that makes unmistakably clear that in  
11 using the term person, Congress intends to include the  
12 sovereign states or state officials, and the legislative  
13 history of the Act indicates that railroad companies were the  
14 target of the statute.

15 The traditional legal definition of person excludes the  
16 sovereign. Congress legislates against a framework knowing  
17 that its use of the word person does not include the sovereign  
18 unless it affirmatively indicates otherwise.

19 When Congress passes laws that encompass the government,  
20 other matters arise for consideration, such as sovereign  
21 immunity, as one example.

22 Congress can change the law to subject states to  
23 Section 10 of the Rivers and Harbors Act, but this Court should  
24 not redefine "person" to include a sovereign state or state  
25 officers.

1 And if the Court has no further questions, I would like to  
2 reserve the remainder of my time for rebuttal.

3 THE COURT: Absolutely.

4 MS. AL-FUHAID: Thank you, Your Honor.

5 THE COURT: Thank you very much. Your argument was  
6 very helpful.

7 All right, Counsel.

8 MR. KNUDSEN: Good morning, Your Honor. May it  
9 please the Court, my name is Andrew Knudsen representing the  
10 United States of America, the plaintiff.

11 Texas raises several novel legal arguments in support  
12 of its Motion to Dismiss United States Amended Complaint, but  
13 these arguments are flatly inconsistent with federal law and  
14 applicable precedent and should be rejected.

15 First, regarding the United States' claim under the  
16 Rivers and Harbors Act, Texas argues that the RHA is wholly  
17 unenforceable against the states as a general matter. But the  
18 plain text of 33 U.S.C. 406, which is also referred to as  
19 Section 12 of the RHA, authorizes injunctive relief for removal  
20 of any structure regardless of whether it was constructed by a  
21 state or a person or a corporation.

22 THE COURT: Well, wait, wait, wait -- stop. Where  
23 does it say in there a state? I don't think it says state.

24 MR. KNUDSEN: Well, your Honor, it doesn't  
25 specifically say state. It says that -- it provides injunctive

1 relief for the removal of any structure or part of the  
2 structure constructed in violation of specific other sections  
3 of the RHA.

4 THE COURT: Okay, but they -- you know, counsel  
5 argued -- I'm -- I want to hear from you on this because it's  
6 important. Counsel argued that Section 12 is the operative as  
7 to who the injunction can be enforced against.

8 Now, do you have -- I know you disagree with that,  
9 obviously. You just said so, and in your papers you said so,  
10 but do you have any cases from the Supreme Court or otherwise  
11 where the state was a defendant or a party in a Rivers and  
12 Harbors Act case?

13 MR. KNUDSEN: Well, two points in response to that,  
14 Your Honor. The only cases involving states before the Supreme  
15 Court, I believe Your Honor has noted in the past, the case of  
16 the Sanitary District of Chicago, which again, was not a case  
17 against the State of Illinois, but it was a state involving --  
18 a case involving a state chartered entity. Texas hasn't  
19 offered any reason why that should be treated differently for  
20 the purposes of the RHA.

21 And also the Supreme Court's decision in the United  
22 States versus Arizona, again, while it was not a case brought  
23 against the state of Arizona, it's a case in which the Supreme  
24 Court directly addressed this question of whether the RHA's  
25 substantive prohibitions in sections like Section 9 and 10, and

1 the injunction relief it authorizes in Section 12, are limited  
2 to persons and corporations, as Texas has argued here, and has  
3 squarely said that it's not so limited, that it also includes  
4 states and state officers as well as federal officers, which is  
5 the party that was involved in that case.

6 Now, our position is -- is not whether -- this argument is  
7 not a case -- excuse me, Your Honor.

8 This case is not one about whether the State of Texas is a  
9 person under the RHA, despite the emphasis on that issue in  
10 Texas' arguments, because the United States has never argued in  
11 this case that Texas is a person for purposes of that statute.

12 Our position is that the injunctive relief authorized by  
13 the second sentence of Section 12 33 U.S. 406 is not so limited  
14 as the criminal relief -- criminal enforcement authority as  
15 authorized by the first sentence.

16 THE COURT: Are you arguing -- I want to make sure I  
17 understand this now.

18 Are you arguing that the person here would be  
19 Governor Abbott in his official capacity?

20 MR. KNUDSEN: No. Your Honor, our position is  
21 that --

22 THE COURT: If that's the case, then Governor Abbott  
23 in his official capacity is really the State of Texas.

24 MR. KNUDSEN: No, Your Honor. Again, our position is  
25 that the second sentence of Section 12 authorizing injunctive

1 relief is not limited to persons and corporations in the way  
2 that the first sentence is; that it extends to any entity that  
3 constructs a structure or an obstruction in navigable capacity  
4 in the waters covered by the RHA.

5 THE COURT: All right. I'm sure that we'll hear some  
6 rebuttal from counsel.

7 MR. KNUDSEN: Certainly, Your Honor. Well, I think  
8 the text of Section 12 is clear on its face, though, that  
9 district courts can issue injunctions for removal of any  
10 structures constructed in violation of Sections 9, 10, and 11  
11 of the RHA. And there's no reason to --

12 THE COURT: Well, I don't -- excuse me, I'm sorry, I  
13 didn't mean to interrupt you. Go ahead.

14 MR. KNUDSEN: Well, Your Honor, I was going to say  
15 there's no reason to read that second sentence in the provision  
16 for injunctive relief as simply being a form of ancillary  
17 relief in addition to the criminal penalties authorized by the  
18 first sentence.

19 Essentially, the two sentences of Section 406 deal with  
20 different topics and have different scopes.

21 So the first sentence deals with who can be subject to  
22 criminal enforcement; not surprisingly, that's limited to  
23 persons or corporations.

24 But the second sentence is dealing with an entirely  
25 different question of what kinds of structures can be subject

1 to injunctive relief for removal under the RHA. And the text  
2 of that second sentence is clear that it applies to any  
3 structure or part of a structure constructed in violation of  
4 specific parts of the RHA.

5 There's nothing ambiguous about the use of the term "any."  
6 Any should be read to mean literally any structure that's  
7 constructed in violation of those provisions.

8 And to the extent that the text of Section 406 itself  
9 isn't dispositive of this question, the Court should look to  
10 the surrounding context of the statute as it's required to do  
11 when interpreting the meaning of the statute. And here the  
12 relevant context for the injunctive relief authorized by  
13 Section 12 is the provisions that it's providing enforcement  
14 authority for.

15 In particular, in this case that includes Section 10 of  
16 the RHA, which is what the United States is seeking to enforce  
17 here, and it broadly prohibits the construction of any  
18 obstruction to the navigable capacity of covered waters or the  
19 construction of any other structure in those waters.

20 Again, Section 10 uses this broad language "any  
21 structure." It doesn't contain a parallel limitation to those  
22 built by persons or corporations. So again, on its face, it  
23 applies to states as well.

24 And Texas, by its own actions, seems to have recognized  
25 that, in general. In the past year alone, the State of Texas



1 and its departments have applied for permits under this exact  
2 provision of the RHA showing that they recognize that its  
3 requirements apply to states as well as persons and  
4 corporations. And those specific permits are cited in our  
5 response to the motion to dismiss in our documents the Court  
6 can take judicial notice of.

7 Section 12 also provides enforcement authority for another  
8 section of the RHA, Section 9, which prohibits the construction  
9 of any bridge, causeway, dam or dike without congressional  
10 approval and review of the plans by appropriate federal  
11 officials.

12 Again, that provision uses the broad language prohibiting  
13 any construction of those structures without being limited to  
14 persons or corporations.

15 But beyond that, it also has an explicit exclusion for  
16 certain projects authorized by state legislatures. The  
17 language of that exclusion makes clear that state projects that  
18 don't fall within that exclusion are covered by the general  
19 prohibition of Section 9, and moreover, even the exclusion  
20 itself still retains some federal oversight over those projects  
21 authorized by state legislatures. So again, that provision  
22 clearly applies to works constructed by states.

23 And Texas, in its briefing and in its argument here,  
24 hasn't offered any reason to this Court why Congress would  
25 draft those prohibitions in Sections 9 and 10 of the RHA to

1 broadly include actions by states, but not, at the same time,  
2 provide the United States enforcement authority to seek  
3 injunctive relief to remove those structures when they're built  
4 in violation of the RHA.

5 And I think the hypothetical that Your Honor suggested on  
6 the Mississippi is a good one because it indicates the breadth  
7 of what Texas is suggesting here.

8 To take it a step further, it would seem under Texas'  
9 interpretation, a state, such as the State of Louisiana, could  
10 effectively build a barrier blockading the entirety of the  
11 Mississippi River, preventing traffic from flowing up river to  
12 other states. And the United States would not have a cause of  
13 action under Section 12 to enforce the RHA and seek removal of  
14 that barrier. That's simply an implausible reading of the RHA.

15 We believe that the interpretation advanced by the United  
16 States here is the one that best effectuates the congressional  
17 purpose, which is that the RHA as a whole broadly prohibits  
18 construction of any obstruction to structure and it provides a  
19 corresponding right of relief to provide for injunctive relief  
20 to remove those structures whether built by states or persons  
21 or corporations, and that the first section of Section 12  
22 simply provides a different form of relief through criminal  
23 enforcement for a certain subset of entities that violate those  
24 prohibitions.

25 Unless Your Honor has other questions on the RHA claim,

1 I'll proceed to address the Treaty claim.

2 THE COURT: Sure.

3 MR. KNUDSEN: By way of background, the second count  
4 of the United States' amended complaint alleges that Texas'  
5 construction of the floating barrier is preempted by the 1848  
6 Treaty of Guadalupe Hidalgo.

7 And specifically that cause of action -- that claim  
8 arises under Article 7 of the Treaty, which protects the right  
9 of free navigation of the Rio Grande by citizens and vessels of  
10 both countries, and it prohibits construction of any works that  
11 may impede or interrupt, in whole or in part, that exercise of  
12 that right of free navigation.

13 Notably, there's been much argument in this case  
14 regarding whether the Rio Grande is a commercially navigable  
15 water subject to the RHA scope, but the protection afforded by  
16 Article 7 of the Treaty is not limited to commercial  
17 navigation. In fact, it includes all navigation by citizens  
18 and vessels of both countries. And that's a point that Texas  
19 hasn't disputed in the briefing in this case.

20 But the amended complaint alleges that Texas'  
21 construction of the barrier may impede or interrupt the  
22 exercise of that right of free navigation on the Rio Grande and  
23 that because treaty provisions are the supreme law of the land  
24 under the Constitution's supremacy clause, then Texas'  
25 construction of the barrier is prohibited.

1 THE COURT: Well, they don't contest any of that,  
2 with the exception of a very important point which counsel  
3 made, and that is that it is not a self-executing statute. So  
4 I think -- I mean, self-executing. So I think what you need to  
5 do is address whether it is or it isn't.

6 MR. KNUDSEN: That's right, Your Honor. Texas has  
7 raised two legal arguments. One is the question of  
8 self-execution. The other is whether there is cause of action  
9 to enforce that.

10 THE COURT: Well, it's not self-executing if you  
11 don't have a cause of action.

12 MR. KNUDSEN: Of course, Your Honor.

13 Now, the test for self-execution, as recognized by  
14 the courts over -- since the founding of the country, is  
15 fundamentally a question of evaluating the Treaty text and the  
16 parties' post ratification actions' understanding of the Treaty  
17 provision to determine whether the parties intended it to be  
18 self-executing and have the effect of domestic law without  
19 further action by the political branches.

20 Now, contrary to Texas' framing of this question,  
21 numerous courts, including the Fifth Circuit in the United  
22 States versus Postal, have made very clear that this is not an  
23 inquiry that looks at the Treaty as a whole and determines  
24 whether the Treaty is either entirely self-executing or  
25 entirely not self-executing. It actually proceeds on a

1 provision-by-provision basis.

2           So whether a specific provision of the Treaty is  
3 self-executing or not has no bearing on whether a different  
4 provision of that same treaty is.

5           It's actually extremely rare that a treaty would  
6 directly address in a specific way the mode of its domestic  
7 implementation by one of the parties or speaks specifically to  
8 whether courts may enforce it or not.

9           In setting whether a treaty is self-executing  
10 requires the Court to assess whether the text is sufficiently  
11 precise and obligatory. So it allows for direct application by  
12 the Court. And the Court also has to assess whether the Treaty  
13 provision on its face envisions some kind of future action for  
14 the political branches to give it effect or give more meaning  
15 to its stipulations.

16           Here, the text of Article 7 is clear on its face. It  
17 says exactly what is protected and exactly what is prohibited  
18 and it uses obligatory language to indicate its effect.

19           That treaty language is similar to the Treaty at  
20 issue in the Supreme Court's decision in Asakura versus  
21 Seattle. That involved a treaty between the United States and  
22 Japan, which stated that the citizens of both countries shall  
23 have liberty to carry on trade in each other's countries.

24           The treaty provision didn't speak directly to whether  
25 it's self-executing or not and didn't speak directly to how

1 courts were to go about implementing that in individual cases.

2 The treaty language on its face was simply obligatory  
3 and precise in a way that allowed courts to directly enforce  
4 it.

5 Similarly, there's nothing in Article 7 that suggests  
6 there's a need for the political branches of the United States  
7 or Mexico to take some further action to give effect to its  
8 protection of navigation or to further flesh out the meaning of  
9 that protection.

10 It states very clearly, again, that, "The exercise of  
11 free navigation is to be protected and construction of works  
12 that impede that right are prohibited."

13 This is dissimilar from other treaty provisions that  
14 might speak in more contractual terms regarding what the  
15 parties are going to do in the future. For example, in the  
16 Supreme Court's decision in *Medellin versus Texas* involving  
17 enforcement of decisions by the International Court of Justice.

18 The relevant treaty language there said that the  
19 parties will undertake to comply with ICJ decisions. That kind  
20 of language speaking to future intent that the Supreme Court  
21 held is indicative that a treaty provision is not  
22 self-executing, but that's entirely dissimilar from the treaty  
23 provision we have here in Article 7.

24 In addition to the treaty text, the parties' post  
25 ratification understanding is also relevant to interpreting the

1 meaning of the provision.

2 And here the post ratification actions by the United  
3 States and Mexico reflect an understanding that the protection  
4 of navigation in Article 7 is something that was already in  
5 effect at the time of ratification without the need for some  
6 further implementing legislation by Congress.

7 In particular, several of the subsequent treaties  
8 between the two countries, including the 1853 Treaty and the  
9 1884 convention, discuss the protections in Article 7 as  
10 something that's already in effect, and is to be preserved and  
11 not interrupted by these subsequent agreements between the  
12 parties; not as something that's still awaiting action by the  
13 parties to give effect to.

14 Now Texas' arguments on this issue are primarily  
15 focused on what they term an exclusive dispute resolution  
16 provision in the 1848 Treaty. What they're referring to is  
17 Article 21 of that treaty which contains a mechanism to resolve  
18 disputes between the parties. That is, between the United  
19 States and Mexico.

20 It does not provide some kind of a detailed dispute  
21 resolution mechanism. Essentially, what it says is that the  
22 parties, to the extent disagreements arise between them --

23 THE COURT: I've read it, Counsel.

24 MR. KNUDSEN: Yes, so you'll recognize that it simply  
25 says they'll resolve disagreements without hostility.

1 THE COURT: Right.

2 MR. KNUDSEN: To the extent that that even applies in  
3 the event of disagreements about whether a work has been  
4 constructed in violation of Article 7, which is not clear from  
5 the face of the Treaty, that it's simply irrelevant to how the  
6 United States can enforce its own treaty obligations against  
7 its component parts against a state like Texas.

8 This is not a case involving a dispute between the  
9 United States and Mexico. This is a dispute between the United  
10 States and one of its states that has acted contrary to the  
11 United States' Treaty obligations in the 1848 Treaty.

12 Now, Texas has made a comparison to the Supreme  
13 Court's decision in Medellin and framed that case as one that  
14 turns on -- that turned on the existence of a dispute  
15 resolution mechanism for enforcement of ICJ decisions.

16 We think that's an overly simplistic reading of the  
17 Supreme Court's rationale in Medellin. It's true that the ICJ  
18 statute at issue in Medellin included provisions for what  
19 happens when a party doesn't comply with an ICJ decision.

20 But it wasn't simply the existence of that provision  
21 that led the Supreme Court to find that ICJ decisions were not  
22 self-executing. It was really the specific processes and  
23 mechanisms by which that enforcement was to proceed.

24 Specifically, if a nation did not comply with an ICJ  
25 decision, the relevant treaty language provided for a vote in



1 the UN Security Counsel to enforce the ICJ decision.

2           Importantly, that's a process in which the United  
3 States has veto authority. So the United States has the  
4 opportunity in any vote on a resolution to enforce an ICJ  
5 decision against it to veto that resolution.

6           The Supreme Court looked at the specifics of that  
7 process and found that it was implausible to think that the  
8 President and the Senate, when they ratified this Treaty, would  
9 have understood it to be self-executing, because allowing that  
10 kind of self-execution and applicability in domestic courts  
11 would have been entirely incompatible with the process by which  
12 the United States could elect to exercise its veto in the UN  
13 Security Council proceeding.

14           None of those conflicts are presented here by giving  
15 self-executing effect to Article 7 of the 1848 Treaty.

16           There's nothing about allowing the United States to  
17 enforce Article 7's protections against Texas that would  
18 interfere with its ability to engage in dispute resolution with  
19 the country of Mexico to the extent that disagreements arise  
20 between the two nations.

21           Finally, Texas has presented several arguments  
22 regarding the self-executing nature of other provisions of the  
23 1848 Treaty primarily focusing on Article 8 of the Treaty  
24 involving treatment of property rights of Mexicans in the  
25 territory ceded to the United States in that treaty.

1           As I noted before, it's black-letter law that  
2 self-execution of treaty provisions is determined on a  
3 provision-by-provision basis.

4           So again, there's nothing about the nature of  
5 Article 8 or any other provision of the 1848 Treaty that is  
6 really dispositive of the self-executing nature of Article 7.

7           So again, the legislation and Supreme Court decisions  
8 addressing whether that provision was self-executing or not  
9 simply have no bearing on the self-execution analysis here.

10           Finally, Your Honor, I'll turn to the argument that  
11 the United States lacks a cause of action to enforce Article 7  
12 of the Treaty.

13           This Court rejected that same argument just a few  
14 weeks ago in granting the preliminary injunction in the SB4  
15 case and held that the United States can pursue a nonstatutory  
16 cause of action in equity to enjoin state action that's  
17 preempted by the supremacy clause.

18           The same rationale applies here. Texas has primarily  
19 relied on the Supreme Court's decision in *Armstrong*, but again,  
20 as this Court recognized, that case only held -- that case, in  
21 fact, recognized that there exists a separate cause of action  
22 in equity to enforce the supremacy clause.

23           And since the time the Supreme Court decided  
24 *Armstrong*, it's also decided other cases in which the United  
25 States has pursued a cause of action and equity to enforce the

1 supremacy clause, including United States versus Washington  
2 just a few years later.

3 And the 5th Circuit has recognized the availability  
4 of that equitable cause of action as well, including just last  
5 year in Crown Castle Fiber versus City of Pasadena.

6 It's true that Congress can in some instances  
7 displace the right of equitable relief under -- to enforce the  
8 supremacy clause, which is, in fact, what the Supreme Court  
9 found in its decision in Armstrong, but Texas hasn't, in this  
10 case, identified any law passed by Congress that would displace  
11 the equitable relief that the United States is seeking here.

12 If the Court has no further questions on any other  
13 aspects of the motion to dismiss, the Court should deny the  
14 motion to dismiss for the reasons so stated.

15 THE COURT: Thank you very much, Counsel. Your  
16 argument has been quite helpful.

17 Counsel, you'd like a few minutes for rebuttal?

18 MS. AL-FUHAID: Yes, Your Honor, just a few minutes.

19 THE COURT: Sure. Can you address, if you will -- I  
20 don't want to throw you off here -- but the issue of the United  
21 States' ability to pursue a supremacy clause argument and  
22 equity, because it seems to me that counsel -- your opposing  
23 counsel, has argued that the United States Supreme Court has  
24 recognized an equitable cause of action under the supremacy  
25 clause, and I'm going to be looking into that more carefully.

1           Obviously, I've already ruled on it in one case,  
2 but --

3           MS. AL-FUHAID: Well, Your Honor, the United States  
4 and Mexico have only ever -- in later treaties, have never  
5 provided for any sort of judicial remedy for any violation of  
6 the Treaty of Guadalupe Hidalgo. And instead, they agreed to  
7 assign navigability disputes to the exclusive jurisdiction of  
8 the International Boundary and Water Commission. And these are  
9 only diplomatic remedies.

10           Now, the international agreements do not by  
11 themselves create a cause of action, and -- because that's  
12 because the treaties are primarily claims just between  
13 independent nations related to political and diplomatic  
14 matters.

15           THE COURT: Can I interrupt you for just a second?

16           MS. AL-FUHAID: Yes.

17           THE COURT: Because I think we need to get  
18 clarification from opposing counsel so I can ask you the next  
19 question, all right.

20           MS. AL-FUHAID: Of course, Your Honor.

21           THE COURT: When you are making this argument on the  
22 supremacy clause giving the cause of action to the United  
23 States, are you also including within that the cause of action  
24 under the Rivers and Harbors Act, or is this just for the  
25 Treaty?

1 MR. KNUDSEN: No, Your Honor, this is simply for the  
2 Treaty claim.

3 THE COURT: That's what I understood. All right.  
4 Would you like to speak with co-counsel? It's okay.

5 MS. AL-FUHAID: That's okay, Your Honor.

6 THE COURT: I'll give you a couple of minutes if you  
7 need it.

8 MS. AL-FUHAID: I think we're okay, Your Honor.  
9 Thank you, though.

10 THE COURT: Did you hear his argument? He's only  
11 confining -- if you didn't -- because I think you were talking  
12 to co-counsel.

13 What's happening is that he's confining his supremacy  
14 clause argument only to the Treaty. He's not make a supremacy  
15 clause argument for equitable relief under the Rivers and  
16 Harbors Act.

17 I thought that was the case. I wanted to be sure.

18 MS. AL-FUHAID: Well, Your Honor, if that argument is  
19 true, then there's no distinction between self-executing and  
20 non-self-executing treaties. That would make the concept of a  
21 non-self-executing treaty irrelevant.

22 So the Supreme Court has recently, in the Medellin  
23 case in 2008, has described how to determine whether a treaty  
24 is self-executing or non-self-executing.

25 And one of the indicators that a treaty is

1 non-self-executing is the provision within the treaty of an  
2 express diplomatic remedy.

3 And so the reference in Article 21 to agreeing to  
4 mutually negotiate and do so without hostilities is a  
5 diplomatic and political remedy. So that is an indicator that  
6 the Treaty is non-self-executing.

7 So that was why I raised the issue of the  
8 International Boundary and Water Commission.

9 THE COURT: I understand your argument. Thank you  
10 for that clarification.

11 MS. AL-FUHAID: And Your Honor, the United States has  
12 successfully argued in the Nino case that the 1848 Treaty does  
13 not create a cause of action so they have successfully asserted  
14 that in past cases.

15 THE COURT: Okay. Here's what I'm going to do on  
16 this issue, because it is -- you can be seated, Counsel. Are  
17 you done?

18 MS. AL-FUHAID: No, Your Honor, I had a couple more  
19 points. Not on the Treaty issue, though.

20 THE COURT: Okay. Go ahead. I'm sorry, I did not  
21 mean to cut you off. I thought you were done.

22 MS. AL-FUHAID: No, it's okay. Actually, I do have  
23 just a couple more points to make about the Treaty issue. In  
24 the Medellin case -- and counsel mentioned that contemplating a  
25 future intent can be an indicator as to whether a treaty is

1 self-executing or non-self-executing.

2 And Article 5 of the Treaty references -- it  
3 contemplates taxing to make rivers navigable. So that  
4 contemplates future action, that would be another indication  
5 under the Medellin case that the treaty is non-self-executing.

6 And as far as applications for permits under the  
7 Rivers and Harbors Act -- you know, the State does not seek  
8 conflict with the federal government just for the sake of  
9 conflict. But our position -- you know, perhaps this is the  
10 first time this conflict has arisen regarding the Rivers and  
11 Harbors Act so that's why it hasn't come up before.

12 Now, as far as the Sanitary District case, which  
13 relates to whether --

14 THE COURT: The Chicago case.

15 MS. AL-FUHAID: The Chicago case, yes. That case did  
16 not apply the Rivers and Harbors Act to a state. It applied it  
17 to a municipal corporation, to a municipality.

18 THE COURT: They were holding -- they were a part of  
19 the state under Illinois law, I believe.

20 MS. AL-FUHAID: Well, it's a municipal governmental  
21 entity. But I would like to point your Honor to the Will case,  
22 which was related to Federal Civil Rights Law, Section 42  
23 U.S.C. Section 1983.

24 THE COURT: Sure, I'm familiar with the Will case.

25 MS. AL-FUHAID: In the Will case the Court held that

1 the -- that statute applied to the municipality, but it did not  
2 apply to a state, because a state -- states were not persons.

3 THE COURT: Yeah, but that's under -- 1983 has its  
4 own body of law having to do --

5 MS. AL-FUHAID: Well, of course. It does have its  
6 own body of law, but the definition of person, as a presumption  
7 across all federal statutes, excludes the state unless Congress  
8 affirmatively indicates that it's included. So the Federal  
9 Civil Rights Law is just one example.

10 THE COURT: I don't know that the Will case really  
11 helps you here, but you have some other good points. I would  
12 like to have you respond to this question: You've pointed out  
13 that in Chicago it was a municipal corporation, but there is no  
14 indication in the language that is in the Rivers and Harbors  
15 Act that would specifically say municipal corporations or  
16 cities. It doesn't say that, just like it doesn't say state.

17 MS. AL-FUHAID: Yes, Your Honor, that's correct, that  
18 language is not contained in the statute.

19 THE COURT: Okay. So why don't you go on to whatever  
20 else you have to argue on the Rivers and Harbors Act and then  
21 I'm going to circle around to this again.

22 MS. AL-FUHAID: Okay. Only one more point, Your  
23 Honor. I'd like to refer the Court to the Atascadero State  
24 Hospital case. The United States has argued that the second  
25 sentence of Section 12, because it authorizes an injunction to



1 remove any structure, that it can refer to any structure even  
2 if it was not constructed by a person or a corporation in the  
3 first sentence of Section 12.

4 But that reading is too broad. And as an example of  
5 that -- it's too broad to bring in the state, to bring the  
6 state within the ambit of the statute because Congress has to  
7 specifically and affirmatively indicate it is subjecting the  
8 states to a statute when it chooses to do so.

9 And as an example, in the Atascadero State Hospital  
10 case, a statute provided for civil remedies for violations that  
11 were committed by any recipient of federal assistance. And the  
12 Court in that case held that that was not the kind of  
13 unequivocal statutory language that was sufficient to abrogate  
14 the 11th Amendment when a state was such a recipient.

15 So the use of the word "any" was -- like any  
16 obstruction -- any recipient like any obstruction here was not  
17 enough to bring a state within the ambit of statute.

18 So Congress was not specific enough in the Rivers and  
19 Harbors Act to be able to do that.

20 And if it wishes to be able to seek injunctive  
21 relief -- if it wishes for the federal government to be able to  
22 seek injunctive relief against a state under the Rivers and  
23 Harbors Act, then Congress would have to amend the statute to  
24 apply it to states.

25 And I have nothing further, Your Honor, unless the

1 Court has questions.

2 THE COURT: No, I don't.

3 MS. AL-FUHAID: Thank you.

4 THE COURT: I am going to call for some very brief  
5 supplemental briefing, not on the Rivers and Harbors Act,  
6 that's not -- I mean, I can deal with that. I think you both  
7 have been very thorough and gotten your points across, and I  
8 fully, I think, understand what your positions are, both from  
9 your papers, which were very good on both sides, I might add,  
10 and from your arguments, which were also very good on both  
11 sides, and I appreciate your arguments.

12 But I am a little bit concerned about this very  
13 tricky issue under the Treaty that we just discussed. Remember  
14 when I kind of asked -- we were discussing it and I kind of  
15 said, *Well, just a minute*, and you said, *Oh, I'm sorry, I'm not*  
16 *done*, and I said, *I'm sorry, I thought you were done*, because I  
17 thought you were sitting down.

18 I'm -- I'd like some additional supplemental briefing  
19 with some more citations on the standing issue under the --  
20 because that's basically -- your key argument is -- the State's  
21 key argument is that the statute isn't self-executing, that  
22 basically the federal government has no cause of action against  
23 a state, correct?

24 MS. AL-FUHAID: Yes, Your Honor.

25 THE COURT: I'd like to have some supplemental

1 briefing on that from both sides rather than have you just pop  
2 something off the top of your head. I think you both have done  
3 an excellent job today, but I really want to take another hard  
4 look at that, because it isn't as easy as it may sound. And I  
5 know you both have taken very firm positions on this, and there  
6 are certainly arguments to be made on both sides and that's  
7 always a problem for a court.

8 And so I do very much want to make sure that I make  
9 the very best decision I can, and so I do want to get some  
10 supplemental briefing. How much -- no more than maybe, say,  
11 seven pages or so, that should do it. I'll give you ten pages,  
12 okay.

13 MS. AL-FUHAID: I just have one question, Your Honor.  
14 Do you want the briefing to be on whether the Treaty is  
15 self-executing as well?

16 THE COURT: Yes.

17 MR. KNUDSEN: Your Honor, I'm sorry, may I clarify,  
18 too? So this is addressing both self-execution and whether the  
19 United States has a cause of action?

20 THE COURT: Yes, that's right. And any legal -- what  
21 I'm looking for is as much law as you can give me, okay.  
22 Because we're looking, we're not finding a lot, so I want to  
23 give you the opportunity to see if maybe you can find something  
24 that we haven't found.

25 I just got back from sitting on the Ninth Circuit in

1 San Francisco, and -- as you know, I do a few times a year, and  
2 I guess it wasn't this sitting, but it was a previous sitting  
3 that I had in Portland, Oregon in '23, where we had a similar  
4 issue where we just couldn't get our hands around the law.

5 So we discussed it, the three judges on the panel,  
6 and we decided we needed some supplemental briefing on that  
7 issue and it was quite helpful to get that.

8 It's not unusual for a judge to ask for supplemental  
9 briefing. It's just like when I do a nonjury trial, I don't  
10 have the lawyers get up in front of me and give a closing  
11 argument. I have them give me their closing argument in  
12 writing.

13 Why? So that they can have an opportunity to go back  
14 over the transcript, go back over the record, incorporate the  
15 law as they understand it and they've argued it, along with the  
16 facts that have been developed, and give me that, and I can  
17 read it.

18 And it's their best argument. Not just somebody  
19 standing up -- you have to do it in a jury trial, obviously. I  
20 was a trial lawyer. But it isn't going to be your very best  
21 argument like you have if you can sit down and provide it in  
22 writing.

23 A very, very fine circuit judge, who was a very fine  
24 trial lawyer, told me that that was the way that he preferred  
25 it, and I thought that's a great idea.

1 And so this is going to be helpful to me I'm sure.  
2 How much time do you need?

3 MS. AL-FUHAID: I was going to ask the Court when the  
4 Court wanted to receive --

5 THE COURT: In spite of the fact that certain  
6 judges -- not all, thank goodness -- certain judges on the  
7 Fifth Circuit accused me of rushing things to cut off the Fifth  
8 Circuit. I never intend to do that, I never did it, and I  
9 never would do it. I mean, I have enormous respect for the  
10 Fifth Circuit Court of Appeals. I always have, continue to.

11 Now, it would be helpful if a few of those judges  
12 wouldn't provide us with advisory opinions, which generally  
13 federal judges are not allowed to do, according to the Supreme  
14 Court, but that's their business and not mine. I don't pay  
15 attention to advisory opinions. I look for the facts and the  
16 law as they're developed in the court.

17 Yes, ma'am.

18 MS. AL-FUHAID: Your Honor had asked how much time we  
19 would want.

20 THE COURT: Yes, how much time do you need?

21 MS. AL-FUHAID: Perhaps a week, perhaps until  
22 Wednesday of next week.

23 THE COURT: If you think you can do it in a week, a  
24 week is fine. I'm happy to give you a little longer if you  
25 need it.

1 MR. KNUDSEN: Your Honor, the United States can work  
2 on that timeline.

3 THE COURT: All right. I'll give you seven days from  
4 today.

5 MS. AL-FUHAID: Thank you, Your Honor. Today is  
6 Tuesday.

7 THE COURT: All right. So next Tuesday, okay.

8 MS. AL-FUHAID: Okay. Thank you, Your Honor.

9 THE CLERK: It would be March 26th.

10 THE COURT: March 26th by 5:00 p.m. Central time,  
11 which would be 6:00 p.m. East Coast time. I'm very attuned to  
12 East Coast time now with Justice Alito and his getting things  
13 done by 5:00.

14 Okay, Counsel, I want to really sincerely thank you  
15 for your arguments today. They've been very very helpful, and  
16 I am going to start looking at this, obviously, again. I  
17 promised counsel that I would give it a fresh look and I intend  
18 to do that.

19 This is a case. This isn't SB4. This is the buoy  
20 case. So I have written in the buoy case before, but this is a  
21 different motion. I want to make it very clear that I'm not  
22 rushing into doing this motion for -- to dismiss -- hearing it.  
23 Both counsel wanted me to hear it sooner rather than later. Am  
24 I correct? So we can get this on the record.

25 MS. AL-FUHAID: Yes, Your Honor. Thank you for your

1 time.

2 MR. KNUDSEN: Yes, sir.

3 THE COURT: Because I've been accused of rushing  
4 things through, which is -- heaven forbid. Usually the  
5 accusation is that judges sit on things and don't get them  
6 filed; not that they rush them through.

7 But anyway, I will try to get this out as quickly as  
8 I possibly can, consistent with taking into consideration your  
9 supplemental briefing. I'm certainly not going to ask you to  
10 do supplemental briefing and then not pay any attention to it.

11 There's nothing worse -- and I know this as a trial  
12 lawyer, there's nothing worse than to have lawyers come in,  
13 make an impassioned argument that they worked very hard on and  
14 then have the judge say, *Okay, I'm ready to make a ruling*, and  
15 then read off their ruling, which means they didn't pay a bit  
16 of attention to what they argued. I can assure you it's not  
17 happening with me and it's not happening here.

18 I'm going to stand in recess. Thank you. Please  
19 have a good rest of the week.

20 (Proceedings concluded at 11:07 a.m.)

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23-CV-00853

MOTION HEARING

03/19/2024

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1 UNITED STATES DISTRICT COURT  
2 WESTERN DISTRICT OF TEXAS

3  
4 I certify that the foregoing is a correct transcript from  
5 the record of proceedings in the above-entitled matter. I  
6 further certify that the transcript fees and format comply with  
7 those prescribed by the Court and the Judicial Conference of  
8 the United States.

9  
10 Date signed: March 21, 2024

11  
12 /S/ Lisa A. Blanks

13 \_\_\_\_\_  
14 Lisa A. Blanks, CSR, CRR, RPR  
15 Official Court Reporter  
16 262 West Nueva Street  
17 San Antonio, Texas 78207  
18 (210)244-5038  
19 lisa\_blanks@txwd.uscourts.gov  
20  
21  
22  
23  
24  
25

U.S.D.C. Official Court Reporter  
Lisa A. Blanks